

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
FRANK LEOGRANDE	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of New York State Personal Income Tax	:	
under Article 22 of the Tax Law and New York	:	
City Personal Income Tax under Chapter 46,	:	
Title T of the Administrative Code of the City	:	
of New York for the Year 1983.	:	

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Petitioner, Frank Leogrande, 15-55 216th Street, Bayside, New York 11360, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law and New York City personal income tax under Chapter 46, Title T of the Administrative Code of the City of New York for the year 1983 (File No. 804792).

A hearing was held before Robert F. Mulligan, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 11, 1990 at 10:30 A.M., with all briefs to be submitted by July 11, 1990. Petitioner appeared by Murray Appleman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Angelo A. Scopellito, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly estimated petitioner's 1983 personal income tax based on his income for 1982.

FINDINGS OF FACT

On August 15, 1984, petitioner, Frank Leogrande, through his representative, Murray Appleman, filed an Application for Extension of Timeto File requesting an extension of time for filing his 1983 Federal income tax return to October 15, 1984. The form indicated that a prior extension had been granted extending the time to file to August 15, 1984. The application

was approved by the Internal Revenue Service on September 7, 1984.

On October 15, 1984, the Division of Taxation received a Form IT-201 containing petitioner's name, address and social security number. No income or adjustments were shown on the form. On line 16, "Other Income", the following words were typed: "Fifth & Sixth Amendments to Federal Constitution & applicable State Constitution". The form showed \$1,284.52 in New York State estimated tax paid and \$500.00 in New York City estimated tax paid. The form was unsigned.<sup>1</sup> A copy of the above-mentioned Federal Application for Extension of Time to File was attached to the Form IT-201.

The Division of Taxation requested Federal income tax information with respect to petitioner from the Internal Revenue Service and was advised as follows: "We have no record of returns being filed in the Brooklyn District for the year(s) 1983 through 1985."

On May 5, 1987, the Division of Taxation issued a Statement of Audit Changes to petitioner for 1983 stating as follows:

"A search of our files fails to show a New York State income tax return filed under your name or social security number. Therefore, your New York State income tax is estimated pursuant to New York State Income Tax Law.

Penalty for late filing, at 4½% per month with a maximum of 22½%, and penalty for late payment, at ½% per month with a maximum of

25% have been applied (Sections 685(a)(1) and (a)(2) of the New York State Tax Law).

Section 685(b) penalty has been imposed due to your negligence and/or intentional disregard of the Tax Law or Regulations.

Penalty for underestimation of tax has been applied (Section 685(c) of the New York State Tax Law).

Interest is due for late payment or underpayment at the applicable rate. Interest is mandatory under the Law.

Computation of Personal Income Tax	<u>STATE</u>	<u>CITY</u>
Estimated New York Wages		\$25,000.00
Less: Standard Deduction		2,500.00
Less: Exemption		800.00

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<sup>1</sup>Neither party has contended that the unsigned IT-201 constituted a valid tax return.

New York Taxable Income	\$21,700.00	
Tax on Above	\$1,611.00	\$545.60"

Petitioner's 1983 wage income was estimated at \$25,000.00 based on his reported 1982 wage income of \$22,476.00.

On August 7, 1987, the Division of Taxation issued a Notice of Deficiency to petitioner for 1983 asserting \$2,156.60 in tax, \$1,130.77 in penalty and \$733.20 in interest due, for a total due of \$4,020.57.

On November 13, 1989, the deficiency was reduced by application of a credit of \$184.52 from petitioner's 1982 return and \$1,600.00 in payments for 1983, resulting in a deficiency of \$306.96 in State tax and \$65.12 in New York City tax, plus penalty and interest.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner claims that the deficiency was arbitrary and therefore must be cancelled, citing Matter of Stephen Fortunato (Tax Appeals Tribunal, February 22, 1990).

The Division of Taxation claims that the instant case is distinguishable from Fortunato in two respects:

(a) Here, the Division of Taxation attempted to obtain information from the Internal Revenue Service and was advised that petitioner had filed no returns for 1983 through 1985. In Fortunato, it appears that no inquiry was made of the Internal Revenue Service.

(b) In Fortunato, some documentation was introduced by the taxpayer to refute the rational basis for the deficiency. Here, petitioner submitted nothing.

#### CONCLUSIONS OF LAW

A. The deficiency issued against petitioner was not calculated on a rational basis and must be annulled. Most significantly, no request for information was made of petitioner. Also, despite the fact that there was nothing to show that petitioner worked for the same employer in 1983 as in 1982, his 1982 income of \$22,476.00 (increased for some undisclosed reason by about 11.25% to \$25,000.00) was used as the basis for his 1983 income. While this case is somewhat distinguishable from Matter of Stephen Fortunato (supra) primarily because a request

for information was made of the Internal Revenue Service<sup>2</sup>, the distinction is not significant enough to warrant a different result.

B. The petition of Frank Leogrande is granted and the Notice of Deficiency issued August 7, 1987 (Finding of Fact "5"), as reduced on November 13, 1989 (Finding of Fact "6"), is cancelled. (It is noted that

there is no issue herein as to the application of the \$184.52 credit for 1982 or the \$1,600.00 in payments for 1983 against the deficiency.)

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

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<sup>2</sup>Where the assessment is arbitrary, a taxpayer does not have to prove the assessment to be incorrect. Accordingly, the distinction noted in paragraph "8(b)" is immaterial.